Law Offices of Susan G. Kellman
25 Eighth Avenue
Brooklyn, New York 11217
Telephone: (718) 783-8200 *Telefax: (718) 783-8226*
e-mail address: kellmanesq@aol.com

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Via ECF and Regular Mail
Hon. Sterling Johnson
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. William Bonfiglio
03 Cr. 605-04 (SJ)

Dear Judge Johnson:

This letter is submitted in connection with the upcoming sentence of Mr. William Bonfiglio.

INTRODUCTION

On February 26, 2004, Mr. Bonfiglio pleaded guilty to Count One of the above-referenced indictment, charging that he and others conspired to collect unlawful debts related to loan sharking and gambling activities in violation of 18 USC §§1962 (c)(d) and 1963 (a). Mr. Bonfiglio's plea agreement, entered into prior to the Supreme Court's decisions in Blakely and/or Booker and Fanfan, provided for a base offense level of 19, and was enhanced by a three (3) points for conduct committed while on pre-trial release; a three (3) point reduction for acceptance of responsibility, and an additional one (1) point reduction for a global disposition of the matter. During the plea negotiations, the parties "agreed to disagree" regarding the appropriateness of a three (3) point enhancement for Mr. Bonfiglio's role in the offense. Finally, the government agreed that it would not seek any upward departures; however, the plea agreement permits Mr. Bonfiglio to challenge the enhancement for his "role" in the offense and to make appropriate submissions in support of an application for a downward departures.

In light of the new "advisory" status of the sentencing guidelines and the plain language of § 3553 (a), Mr. Bonfiglio respectfully requests that the Court decline to impose the three (3) point enhancement for his role in the offense, permit the one (1) point adjustment for the global disposition of the case and grant Mr. Bonfiglio a downward adjustment based upon his role in the offense, his service of a related sentence in a case brought by the Southern District of New York and a serious decline in his physical health.

I. Probation Report Fails To Permit Reduction of One Level for Global Disposition

At paragraph 2 of the PSR, the officer objects to a one (1) level reduction of the offense level calculation which was agreed to in the plea agreement, stating that such a Garcia-like reduction, "is not on point as the facts that warranted a downward departure in Garcia[1] are very different from the instant case." The officer makes no mention as to how the facts in this case differ from the facts in Garcia; nor is there any suggestion that the officer, who was not a party to the plea negotiations in this case, would have any idea whatsoever as to the nature and extent of the negotiations that gave rise to the Garcia decision. This objection by the Probation Department is sufficiently transparent and unsupported that it should not be given any consideration by Your Honor.

II. Plea Agreement and Probation Adjustment for Supervisory Role Is Not Appropriate

At paragraph 45 the PSR fails to establish an appropriate basis for a role enhancement for Bonfiglio based upon aggravating circumstances. The PSR reports that Bonfiglio "supervised countless bettors...and others." Of course, the "bettors" are not co-conspirators and could not appropriately be counted in connection with the decision to impose a three (3) level increase in Bonfiglio's offense level.

The increase suggested by the PSR and contained in the plea agreement is objectionable, particularly in light of Mr. Bonfiglio's plea in the Southern District of New York. On January 3, 2002, Mr. Bonfiglio pleaded guilty to loan sharking and securities fraud charges that arouse in an attempt to collect a loan shark debt which involved the same victims/customers during the same time period charged in the instant case. In the Southern District, however, the government *agreed* that Mr. Bonfiglio was entitled to a two (2) level *reduction* because he played a "minor" role in this Colombo-related activity. The role enhancement proposed in the instant agreement is inconsistent with the rationale put forward by the AUSA's in the Southern District of New York, who relied upon many of the same tape recorded conversations that were utilized by the government in this

[1] United States v. Garcia, 926 F.2d 125 (2d Cir. 1991)

Eastern District prosecution. Moreover, its inclusion in the agreement is typical of pleas that were "negotiated" during the era of "mandatory" allegiance to the sentencing guidelines. Here, even the loan sharking ledger that was recovered from Mr. Bonfiglio's home in July, 2001, at the same time as his arrest in the Southern District case, formed the basis for much of the Eastern District's case against Bonfiglio.

The clear import of both the Southern and Eastern District matters is that William Bonfiglio was a "runner" in a sports betting operation, who, from time to time loaned money to bettors. The notion that a "runner" for a gambling operation could be considered for an "aggravating role" enhancement is without merit. First, there is no good faith argument that bettors are "supervised" or "managed" by "runners." Second, there is no prong lower than a "runner" in a sports betting operation and the notion of this somehow constituting a "supervisor" and/or "manager" is not supported by any factual and/or legal argument.

According to the PSR, in ¶¶ 44 - 46, Mr. Bonfiglio was supervised by the defendant, Charles Tavernise, who, according to the PSR was supervised by the defendant Ralph Lombardo – each of whom was sentenced to less time than Mr. Bonfiglio faces. There is no allegation that Bonfiglio was a "member" of the charged enterprise; rather, the best the government can assert is that he was "associated" with certain members in connection with his sports betting customers.

The suggestion in ¶ 44, that Mr. Bonfiglio, "used actual and threatened violence in order to collect debts..." is not supported by the tape recorded evidence produced by the government. In a tape recorded conversation on June 26, 2001, with CW-1, Mr. Bonfiglio, who is referred to as "Whitey," informs the so-called "victim" that there were people who wanted to "hurt" him, but that he, Bonfiglio, was able to "stop them." Bonfiglio continues, "The only reason nothing happens is because I don't want this shit to happen. I told you 100 times I don't want you to get in trouble...." Further, Mr. Bonfiglio relates, "I'm not a fucking 'gangster,' I'm not a fucking 'hood' like these guys...I don't do this shit." The conversation continues, "Look man, it ain't worth it. There's too much fucking heat to fucking break you up; you understand and everyone can be broken up. I said, 'no – no violence – no retribution.' I don't want this fucking shit on my head. Just like I told you – 'I don't do that shit.' ... not worth it." From all of the evidence produced by the government, there is every reason to believe that Mr. Bonfiglio was not a supervisor and that he did not endorse violence in connection with the collection of loan shark debts.

Counsel does not advocate that the overlap in these cases would form the basis for a double jeopardy claim. Similarly, counsel does not suggest that the AUSA's decision to

endorse a role reduction for Mr. Bonfiglio in connection with the same conduct in the S.D.N.Y., binds the Eastern District. Still, it is disingenuous for the government in the Eastern District to suggest that a three (3) level increase is appropriate with regard to the same conduct that the Southern District resolved with a two (2) level reduction in the offense level.

Accordingly, the Court is asked reject the provision which calls for the increase in Mr. Bonfiglio's offense level based upon an aggravating role. This change would need to be reflected in paragraphs 59 and 65 of the PSR, and would itself, reduce the time Mr. Bonfiglio faced from a range of 41-51 months to a range of 37-46 months. Moreover, if the Court were to adopt the minor role calculation that was conceded in the S.D.N.Y., then Mr. Bonfiglio's guidelines would drop to 24-30 months.[2]

III. **Other Grounds For A Downward Adjustment Pursuant To § 3553 (a)**

A. Bonfiglio's Plea in the S.D.N.Y. Forms the Basis a Downward Adjustment

Background:

In July, 2001, Mr. Bonfiglio was arrested pursuant to the unsealing of an indictment charging a conspiracy to collect an extension of credit by extortionate means in violation of federal law.[3] At the same time that he was being arrested by federal authorities from the Southern District of New York, his home was being searched by the Suffolk County District Attorney's Office. During the search of Mr. Bonfiglio's home, a ledger was recovered which became a part of his case in both the Southern and the Eastern District prosecutions. During the plea negotiations in the Southern District, Mr. Bonfiglio's attorney, Bradford Martin ("Martin") sought to resolve all of Mr. Bonfiglio's Southern District matters and the yet uncharged loan sharking and/or gambling charges which he understood were under discussion in the office of the Suffolk County District Attorney.

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[2] This guideline range is calculated on the basis of a base offense level of 19, with a 3 point increase pursuant to § 2J1.7, a 3 point reduction for acceptance of responsibility, a 2 point reduction for role in the offense and a 1 point reduction for a global disposition. (Adjusted Offense Level Calculation: 19+3=22-3=19-2=17-1=16)

[3] Mr. Bonfiglio was also charged in the Southern District of New York, with securities fraud, which arose out of the loan sharking charges, to the extent that so-called loan shark victims sought to discharge their debts to Mr. Bonfiglio with "house" stocks all of which turned out to be worthless.

In an affidavit submitted in support of a *habeas corpus* petition pursuant to Title 28 United States Code, Section 2255, Mr. Bonfiglio claimed that his subsequent prosecution by the Eastern District violated his due process rights. Bonfiglio argued that the DA in Suffolk County and the United States Attorney in the Eastern District of New York had not dealt fairly with him, in light of his Southern District plea and representations to Martin by the Suffolk County District Attorney assuring him that Bonfiglio's loan sharking and bookmaking charges could be disposed of "in a manner that would not require Mr. Bonfiglio to serve additional time in jail." Decision of Judge Cote at page 4. See Exhibit "B." At sentencing, Martin sought an adjournment pending the outcome of the joint Suffolk County and Eastern District investigation to protect the representations made by the Suffolk County DA . Upon further investigation by the Hon. Denise Cote, in the Southern District, the government stated that, "it did not know the details of the Eastern District's ongoing grand jury investigation, but that it had described the charged in the Southern District to Eastern District prosecutors 'so that there wouldn't be any double jeopardy concerns.'" Decision of Judge Cote at page 7.

In the end, Judge Cote denied Mr. Bonfiglio's petition for *habeas corpus* relief holding, among other things, that the Court would not enforce a verbal commitment to receive a concurrent sentence for the state bookmaking and loan sharking crimes, stating again, that this issue is more appropriately addressed to the Court in the Eastern District of New York. Decision of Judge Cote at pp. 10-11. Mr. Bonfiglio was sentenced to 21 months. Significantly, Judge Cote remarked that the securities fraud charges had a *minimal* impact on the sentence, and opined that the related charges should be taken into account by a judge in the Eastern District of New York at the time any Eastern District sentence is imposed. Decision of Judge Cote, at pp. 7-8. In point of fact, as we now know, it was the very same loan sharking and bookmaking charges that formed the basis for the Southern District case that also formed the basis for the Eastern District prosecution of Mr. Bonfiglio.

B. Bonfiglio's § 2255 SDNY Petition Should Be Considered By This Court

Background:

Attached as Exhibits "A" and "B," respectively, is a copy of the § 2255 Petition and supporting papers, filed by Mr. Bonfiglio, as a *pro se* litigant in the S.D.N.Y., together with the decision of the Court denying the petition. The same is attached to this submission to provide Your Honor with the background to Mr. Bonfiglio's involvement in the current matter which, he believes will favorably impact on Your Honor's consideration of his current plight. In his petition, Mr. Bonfiglio claimed that his "conviction was obtained by plea of guilty was unlawfully induced after a prosecutorial

promise, given to his attorney, led him not to go to trial in the S.D.N.Y., but to accept the plea offered by the federal prosecutor because if he did so he would not face any additional time on the same conduct in Suffolk County." Mr. Bonfiglio believed that by entering a plea in the SDNY, that he was also satisfying the prosecutor in Suffolk County. See Exhibit B.

As the Court can see from Mr. Martin's affirmation, it is his belief that government prosecutors deliberately staggered the cases in a way that clearly prejudiced Mr. Bonfiglio's ability to mount a proper defense. Mr. Martin also states that he advised Mr. Bonfiglio that the Suffolk County prosecutor, ADA McPartland, would "be true to his word" and permit Mr. Bonfiglio to plead guilty in Suffolk County to charges that: (1) would not expose him to additional time in jail; and, (2) ultimately formed the basis for the Eastern District prosecution – with the express assistance of ADA McPartland. Instead, the Suffolk County ADA joined forces with the EDNY prosecutors and his investigation inspired the instant charges against Mr. Bonfiglio.

When Mr. Bonfiglio was brought into the EDNY, he quickly came to understand that his conduct in the Southern District and Suffolk County was now being offered against him yet again. While his application for relief was not granted by Judge Cote, it is clearly germane to Your Honor's consideration of the instant sentence.

C. Bonfiglio's Deteriorating Health Warrants A Downward Adjustment

Backgournd:

Paragraph 112 of the PSR reports that Mr. Bonfiglio "enjoys good health" and suffers from no "chronic" ailments. Since the PSR was written, however, Mr. Bonfiglio suffered a massive heart attack while incarcerated in the MDC. As a result, Mr. Bonfiglio was hospitalized for two weeks. After being taken from the MDC to Lutheran Medical Center, it was determined that Mr. Bongfiglio's medical condition was more serious than originally thought. Accordingly, Mr. Bonfiglio was transferred to Lenox Hill Hospital, where he underwent surgery to implant a permanent pacemaker, following a week in the hospital. Attached for the Court's review are the medical records that counsel was able to obtain from the various doctors who treated Mr. Bonfiglio during his hospitalization at Lenox Hill Hospital. Attached as Exhibit "C" is a copy of the medical order records and order that recommended the insertion of a permanent pacemaker into Mr. Bonfiglio's chest.

Of course, having a heart attack is never an occasion to celebrate; however, being stricken with a life-threatening ailment while incarcerated is a nightmare. After

complaining of chest pain for several days, the medical team finally realized that his condition required serious attention and decided to transfer him to Lutheran Medical Center. However, this was not to be accomplished unless and until he changed from institutional shoes into outside shoes. This change of shoes took over two hours, at which time Mr. Bonfiglio was no longer capable of moving on his own. Only this total incapacitation quickened the institutional reaction to a life-threatening attack.

DISCUSSION REGARDING GROUNDS FOR DOWNWARD ADJUSTMENTS

In United States v. Koon, 518 U.S. 81 (1996) the Supreme Court held that an appellate court owes substantial deference to a district court's decision to depart from the sentencing guidelines rage and may not reverse unless the district court has abused its discretion. Following the Supreme Court's decisions in Booker/Fanfan, 125 S. Ct. 738 (2005) and the Second Circuit in United States v. Crosby, 397 F.3d 103 (2d Cir. 2005), t is reasonable to conclude that this Court's authority to exercise its independent judgment with regard to sentencing matters has increased logarithmically, as long as the Court has considered the sentencing guidelines and the proposed sentence is reasonable. Indeed, there can be no dispute that the sentencing scheme in place at the time Mr. Bonfiglio entered into his plea agreement with the government, has been significantly altered by the United States Supreme Court in Blakely, Booker, Fanfan and most recently by the Second Circuit, in Crosby. Clearly, a sentence within the "recommended" guideline range is now to be framed within the context of 18 U.S.C. § 3553 (a), which requires that courts to impose a sentence "sufficient, but not greater than necessary, to . . . provide just punishment." Currently, a sentence within the so-called guideline range is not only not required by the guidelines; rather, the guidelines now allow this Court to take into account all of these factors in fashioning an appropriate sentence:

> It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion form the United States District Judge.

Koon v. United States, 116 S. Ct. 2045 (1996).

In United States v. Crosby, 397 F.3d 103, (2nd Cir. 2005) the Second Circuit confirmed that Booker/Fanfan require the sentencing court to consider the Guidelines *and* all of the other factors listed in Section 3553 (a). Id. at 24. Section 3553 (a) requires the

court to impose a sentence, "sufficient, but not greater than necessary," to comply with the purposes set forth in the statute, and permits a sentencing court to consider the nature and circumstances of the offense and the history and characteristics of the defendant, among other considerations. Here, correctly or otherwise, Mr. Bonfiglio believed that his guilty plea in the Southern District of New York would satisfy the District Attorney in Suffolk County, who played an integral role in the instant offense.

Since Crosby, *supra*, the Court is encouraged to consider the previously "discouraged" grounds pursuant to U.S.S.G. § 5K2.0, which include, among other things, the defendant's, age, health, criminal history and role in the offense. While Section 5H1.4 of the Sentencing Guidelines limits departures based on physical condition to defendants with an "extraordinary physical impairment," even before Crosby, the courts recognized that it retained the authority to grant an application for a downward departure where a defendant suffered from a serious medical condition that is not within the heartland," U.S.S.G. §5K2.0; thus, an "extraordinary physical impairment" was enough to impose a sentence below the guideline range. United States v. Altman, 48 F.3d 96, 104 (2d Cir.1995). Similarly, in United States v. Rioux, 97 Fed. 648 (2nd Cir. 1996), the Second Circuit recognized the district court's authority to grant a downward departure when faced with a medical condition that is clearly outside of the heartland.

Given the seriousness of Mr. Bonfiglio's heart condition, a sentencing adjustment by the Court is respectfully requested. On the day that Mr. Bonfiglio suffered his heart attack, he waited for hours before he could be taken to a hospital; and, even once the decision was made to seek outside assistance for his chest pains, he was sent back to his cell to change his clothing and his shoes. This took nearly two (2) hours. In the same vein, since the time that Mr. Bonfiglio was released from the hospital, it has been extremely difficult for him to receive that medicines prescribed to him by the doctors at Lenox Hill. Indeed, Mr. Bonfiglio reports that he waits weeks before he is able to visit with a physician at the MDC, notwithstanding the need for constant monitoring and medication. As his records indicate, he requires additional hospital visits and follow up care. Sadly, he cannot obtain the medications he requires; nor has he been able to obtain the simple monitoring that is required given the nature of his condition.

Accordingly, Mr. Bonfiglio respectfully requests that the Court grant his motion for a downward departure based upon his extreme medical condition.

CONCLUSION

In the instant case, there are a number of factors that mitigate in favor of Mr. Bonfiglio's application for a downward departure. First, Mr. Bonfiglio is a 59 years old man who recently suffered a very serious heart incident while incarcerated in the MDC. His only prior conviction is for related conduct in the Southern District of New York, for which he has already received and served 21 months. Beyond those 21 months, Mr. Bonfiglio has been detained on this matter since October, 2004. In addition, it is respectfully submitted that the Court can appropriately consider the sentence imposed upon others charged in the same conspiracy. Most notably, it is submitted that the notion that Mr. Bonfiglio, a "runner" in a sports betting operation who makes loans to his customers, albeit usurious loan, should be exposed to more time than Mr. Lombardo, who the government has labeled a "captain" in a crime family and the ultimate source of the funds, is not a just result, particularly, since Mr. Bonfiglio's criminal history points can all be attributed to related conduct.

For all of the foregoing reasons, it is respectfully submitted that the Court should grant Mr. Bonfiglio's motion for adjustments to the PSR and a downward departure and impose a merciful sentence in light of all of these circumstances.

Respectfully submitted,

Susan G. Kellman

cc: Tom Seigel, Esq.
Asst. United States Atty.

William Bonfiglio